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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,
v.
THEODORE B. OLSON, EDWARD C. SCHMULTS
and CAROL C. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is a private association that serves as a spokesperson for the legal profession in this country. The ABA is keenly aware of the necessity of preserving public confidence in the administration of justice. As the Commentary to Standard 3-1.2 of the ABA's Standards for Criminal Justice states:

> It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of the office.

Such a circumstance, the ABA believes, arises when the United States Department of Justice is called upon to investigate the conduct of the President, members of his Cabinet or other high-ranking officials appointed by the President.

Motivated by this concern, the ABA over the past fifteen years has taken a particular interest in the need, under certain limited circumstances, for appointment of a temporary independent counsel within the federal government. In 1973, the ABA's Board of Governors called for the appointment of a special prosecutor to investigate the series of events now known as Watergate. The Board then created a special committee to explore ways to insulate law enforcement agencies from improper influences by high-ranking officials in the Executive Branch of government. One critical recommendation of the special committee was that a statutory mechanism should be established to permit the appointment of a temporary special prosecutor by a special court under carefully defined cir-

[1] This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk.

cumstances and standards.[2] The ABA's House of Delegates—the policy-making body of the ABA—overwhelmingly approved that recommendation. The appointment mechanism created by Congress in the Ethics in Government Act of 1978 was based in large part on the ABA's recommendation.

The ABA has repeatedly testified before Congress in support of both the wisdom and constitutionality of the independent counsel statute.[3] The ABA has also filed *amicus curiae* briefs supporting the constitutionality of the statute in two cases that have ruled or opined that the statute is constitutional[4] and in the case from which this appeal is taken.[5] In August, 1987, the House of Delegates reiterated its support for the independent counsel provisions, urging that the legislation be reenacted without a sunset provision. The resulting resolution reiterates the longstanding, fully considered posi-

[2] *See* American Bar Association Report, *Preventing Improper Influence On Federal Law Enforcement Agencies*, (1976), *reprinted in part in Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 259-378 (1976).

[3] *See Oversight of the Independent Counsel Statute: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 57-58 (1987) (testimony of Irvin B. Nathan on behalf of American Bar Ass'n); *Ethics in Government Act Amendments of 1982: Hearing on S. 2059 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 80-81 (1982) (statement of Robert D. Evans, American Bar Ass'n); *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Senate Comm. on Governmental Affairs on S. 555*, 95th Cong., 1st Sess. 42-51 (1977) (statement of Livingston Hall and Herbert S. Miller on behalf of American Bar Ass'n).

[4] *North* v. *Walsh*, 656 F. Supp. 414 (D.D.C. 1987); *Deaver* v. *Seymour*, 656 F. Supp. 900 (D.D.C.), *aff'd*, 822 F.2d 66 (D.C. Cir. 1987).

[5] *In re Sealed Case*, Nos. 87-5261, 87-5264, and 87-5265, slip op. (D.C. Cir. Jan. 22, 1988).

tion of the American Bar Association that the statute is constitutional.

The ABA thus has a strong, continuing interest in monitoring the implementation of the independent counsel provisions of the Ethics in Government Act and in defending their constitutionality.

SUMMARY OF ARGUMENT

The independent counsel provisions of the Ethics in Government Act were carefully crafted by Congress to ensure fairness and the appearance of even-handedness in the exercise of prosecutorial decision-making involving officials at the highest levels of the Executive Branch. A divided three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, over a vigorous dissent by Judge Ruth Bader Ginsburg, reversed the district court decision and held the provisions unconstitutional. In so doing, the panel majority failed to accord deference to Congress' well-considered exercise of discretion expressly delegated to it by the Constitution. The panel majority misinterpreted and misapplied the constitutional text, which empowers the Congress to legislate as it did here, and misinterpreted Supreme Court precedents that support the constitutionality of this law.

Under the Appointments Clause of the Constitution, art. II, § 2, cl. 2, Congress has authority to "vest the Appointment of . . . inferior Officers . . . in the Courts of Law . . ." as well as in the President or heads of departments. Since the independent counsel is not a specifically enumerated officer whose appointment must be made by the President with the advice and consent of the Senate, Congress is entitled to substantial deference in its determination that the independent counsel is an "inferior" officer. In holding the appointment provision unconstitutional, the panel majority failed to accord deference to Congress' rational classification of the independent counsel as an inferior officer. The panel majority unjustifiably read into the Appointments Clause a

requirement that an inferior officer be "subordinate" to a "principal" officer appointed by the President.

The panel majority also held that the Constitution absolutely prohibits interbranch appointments, *e.g.*, judicial appointment of an officer who performs executive functions. That position has no support in the language of the Constitution and is flatly rejected by this Court's precedents. The test established long ago by this Court is whether there is an "incongruity" between judicial appointment and the tasks performed by its appointee. *Ex parte Siebold*, 100 U.S. 371, 398 (1880). There is no such incongruity here. Judicial appointments of prosecutors have been upheld in analogous circumstances. Since every prosecutor serves as an officer of the court with quasi-judicial responsibilities and immunity for performance of official duties, there is no "incongruity" in the judicial appointment of an independent counsel.

The panel majority incorrectly ruled that the removal provision is unconstitutional. That provision is not ripe for resolution because there has been no attempt to remove appellant. Unlike *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986), this case presents no "here-and-now" issue of one branch's subservience to another that justifies consideration of the removal provision before it is invoked. The removal provision must be invoked by the Attorney General, an officer of the Executive Branch. In any event, the removal provision is constitutional under this Court's decisions in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), *United States* v. *Perkins*, 116 U.S. 483 (1886), and *Weiner* v. *United States*, 357 U.S. 349 (1958). These cases upheld similar restrictions on the President's authority to remove certain officers performing executive functions.

Finally, the panel majority erred in striking down the procedures under which the independent counsel operates. These procedures clearly do not violate any express provision of the Constitution or implicit separation of powers principles. Indeed, they advance those principles by establishing checks and balances on the potential unbridled power of the Executive to investigate and prosecute its own top officers. Contrary to the panel majority's assertions, there are multiple constraints on the independent counsel's discretion, from the limitations inherent in her temporary appointment and the limited scope of her investigation to the provisions for Executive, Judicial and Legislative oversight of various aspects of the independent counsel's responsibilities. The panel majority's speculation about potential abuses and dangers to individual liberties is unfounded.

Based on the express provisions of the Constitution, the Court's long-established precedents, and a proper application of separation of powers principles, the Court should reverse the lower court decision and uphold the independent counsel provisions.

ARGUMENT

I. BACKGROUND: THE INDEPENDENT COUNSEL STATUTE

Unlike the four courts that have viewed the independent counsel provisions as constitutional,[6] the panel majority erroneously struck down Congress' considered response to a grave and recurring practical problem of American government.[7] Congress sought in this enact-

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[6] *In re Olson*, 818 F.2d 34, 43-46 (D.C. Cir. 1987) (unanimous opinion of Senior Circuit Judges MacKinnon, Morgan and Pell); *North* v. *Walsh*, 656 F. Supp. 414 (D.D.C. 1987); *Deaver* v. *Seymour*, 656 F. Supp. 900 (D.D.C.), *aff'd*, 822 F.2d 66 (D.C. Cir. 1987); *In re Sealed Case*, Nos. 87-0197, 87-0205, 87-0215, slip op. (D.D.C. July 20, 1987). Of the nine lower court judges who have considered the constitutionality of the independent counsel provisions, seven have indicated their view that the provisions are constitutional.

[7] On each occasion that Congress has enacted or reenacted the independent counsel provisions, it has heard extensive testimony regarding the constitutionality of such a statute, including testimony from the Department of Justice, which prior to 1981 supported the constitutionality of the statute, *Public Officials Integrity*

ment to create a necessary, but limited, mechanism to insure that credible criminal charges against the highest ranking political officials in the Executive Branch could be investigated and resolved fairly and impartially and with the full confidence of the public. Because the Attorney General is both the chief federal law enforcement officer and a member of the President's Cabinet (and very often a close personal and political advisor), Congress recognized that cases involving "possible wrongdoing by high-level executive branch officials . . . present a fundamental institutional conflict of interest." H.R. Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978); *see* S. Rep. No. 170, 95th Cong., 1st Sess. 5 (1977).

This absence of a sufficient check on the Attorney General was patently documented during the Watergate scandal, when certain officials in the Justice Department, *inter alia*, improperly revealed prosecutorial strategy to the White House and improperly sought to limit the scope of the investigation in its early stages.[8] As the ABA's 1976 Report documents, *see supra* note 2, the problem was by no means confined to those events and has, in fact, been inherent in the uncabined prosecutorial discretion of the Justice Department and its ability to undermine

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Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 14-27 (1977) (statement of John Harmon, Assistant Attorney General, Office of Legal Counsel), as well as arguments by others opposing its constitutionality. After being fully apprised of the legislative history of the constitutional provision at issue, the understanding of the Framers as reflected by their debates and actions in the First Congress, and of the relevant Supreme Court interpretations, Congress concluded on three separate occasions (in 1978, 1983, and 1987) that the independent counsel provisions were constitutional. *See* S. Rep. No. 123, 100th Cong., 1st Sess. 5-6 (1987); S. Rep. No. 496, 97th Cong., 2d Sess. 17 (1982); H.R. Rep. No. 1307, 95th Cong., 2d Sess. 2-6 (1978); S. Rep. No. 170, 95th Cong., 1st Sess. 5-7, 36 (1977).

[8] *The Final Report of the Senate Select Comm. on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. (1974); Watergate Special Prosecution Force, *Report* (1975).

any investigation of persons at the highest levels of any administration. *See* S. Rep. No. 496, 97th Cong., 2d Sess. 5 (1982).

This Court has observed that, "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935). This is consistent with the belief of the Framers of the Constitution in maintaining government *counterpoise*—the need for institutional checks *in addition to* the general sovereignty of citizens through the electoral process.

The panel majority's decision must be reviewed against this crucial background. Only within the framework of limitations and accountability established by Congress in the Ethics in Government Act of 1978 can the special counsel truly be independent.[9]

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[9] A special counsel's independence not only serves the public interest by avoiding both the appearance and reality of a conflict of interest in the Executive Branch, it may also be of great benefit to those persons under investigation. A decision not to prosecute following an independent investigation serves to remove the taint that may occur when a similar conclusion is reached by those closely involved with the target of the investigation, who may be perceived as the beneficiary of political favoritism. As the Reagan Administration has recognized, the independent counsel mechanism is a valuable way of restoring public confidence in the Presidency and the Executive Branch in the wake of allegations of wrongdoing. For example, only a week after the President identified "serious questions of propriety" in the Iran/Contra Affair, N.Y. Times, Nov. 26, 1986, at A10, col. 1, the Attorney General announced plans to apply for appointment of an independent counsel to look into the matter "with the full encouragement and support of the President." N.Y. Times, Dec. 3, 1986, at A11, col. 1. This recognition is also inherent in President Reagan's signing the bill into law on two occasions, though he expressed doubts about the law's constitutionality in 1987. It is difficult to reconcile these purported doubts with the Administration's twice signing and declining to veto the legislation, or with its ready invocation of the independent counsel provisions when it appears desirable. *See also* N.Y. Times, Mar. 23, 1985, at A1, col. 6 (Edwin Meese III makes public request for

II. THE INDEPENDENT COUNSEL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT ARE CONSTITUTIONAL

In deciding cases implicating separation of powers principles, the Court has emphasized that the three branches of government are not "hermetically" sealed from one another. *INS* v. *Chadha*, 462 U.S. 919, 951 (1983); *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976). This is so because, as Justice Jackson stated in his concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

343 U.S. 579, 635 (1952).

The Court's approach to separation of powers issues has been flexible and pragmatic, seeking at every turn to address the Framers' concern that Congress not overreach the bounds of its constitutional role by arrogating to itself the power to execute laws.

The panel majority's rigid, absolutist analysis leads away from such an approach, reasoning instead from far-fetched hypotheticals that disregard the realities of governance.[10] This Court should instead be guided by the language and intentions of the Framers as well as its own precedents to conclude that the independent counsel

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appointment of independent counsel to investigate charges against him); Wash. Post, Apr. 29, 1986, at A1, col. 5 (Michael Deaver; same); N.Y. Times, Dec. 23, 1981, at A1, col. 1 (Raymond Donovan; same).

[10] For example, the majority decision states that unless the statute is declared unconstitutional "it is difficult to see . . . why Congress could not delegate to a particular court—. . . one district judge —the appointment of all Executive Branch officers (save department heads)" (slip op. at 39) or all officials in the State Department responsible for arms control or Latin American affairs. Slip op. at 40.

mechanism is a very limited, constitutionally permissible solution to the recurring problems arising from the inherent conflicts of interest in Executive Branch investigations of the President and his closest advisors.

A. The Procedures for Appointing the Independent Counsel Are Constitutional

In enacting this legislation, Congress determined that the independent counsel is an "inferior Officer" within the meaning of the Constitution, H.R. Rep. No. 1307, 95th Cong., 2d Sess. at 5 (1978), and vested authority to appoint the independent counsel in the special division of the United States Court of Appeals for the District of Columbia Circuit. S. Rep. No. 170, 95th Cong., 1st Sess. at 3-4 (1977). This procedure is sanctioned by the express language of the Appointments Clause, which provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper*, in the President alone, *in the Courts of Law*, or in the Heads of Departments.

Art. II, § 2, cl. 2 (emphasis supplied).

Despite the express language of this provision, the panel majority held that Congressional authorization of court appointment of an independent counsel is unconstitutional on the grounds that (1) an independent counsel is not an "inferior Officer," and thus must be appointed by the President and confirmed by the Senate; and (2) the Constitution flatly prohibits interbranch appointments. Both grounds for this ruling are contrary to the Constitution and the precedents of this Court.

1. *This Court Should Defer to Congress' Judgment that the Independent Counsel Is an "Inferior Officer"*

The Appointments Clause divides the officers of the United States into two classes: (1) those who are expressly named in the Clause and must be appointed by the President subject to the advice and consent of the Senate, and (2) "inferior Officers" whose appointment Congress may entrust "as they [Congress] think proper" to the President, the courts, or the heads of departments. *See United States* v. *Germaine*, 99 U.S. 508, 509-10 (1878).

The Appointments Clause authorizes Congress to create all officers "by law" and to decide which of them should be classified as "inferior." The Framers made no attempt in the Appointments Clause exhaustively to catalog "inferior Officers," nor even to provide comprehensive definitions to govern classification. Instead, the Framers identified specific officers whose appointments required Presidential appointment with Senate confirmation and expressly left it to Congress to determine, with respect to officers other than those specified in the Clause, which branch should appoint them, including which additional ones should be appointed by the President with the advice and consent of the Senate. *United States* v. *Germaine*, 99 U.S. at 509-10. Thus, Congress' legislative classifications of officers under the Appointments Clause are entitled to deference not merely because all enactments of Congress are presumed to be constitutional, *see Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 n.9 (1983); *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), but especially because the Framers so clearly entrusted to Congress the discretion to classify officers as inferior and assign the responsibility of appointing them "as they think proper." *Ex parte Siebold*, 100 U.S. 371, 397-98 (1880).[11]

[11] In light of this express language of the Constitution, it is remarkable that the majority decision below pointedly declines to give *any* deference to the Congressional determination. Slip op. at 23, n.20.

The independent counsel is not one of the officers enumerated in the Appointments Clause, nor are the functions of the independent counsel similar in scope to any so named. Congress acted reasonably in classifying an independent counsel as an inferior officer. The authority and duties of an independent counsel are narrowly circumscribed. She may only investigate and prosecute a single, defined matter delineated by the court. She does not make administration "policy" and must abide by existing regulations and policies whenever possible. She is only appointed upon the request of the Attorney General, whose discretion in this regard is absolute and unreviewable. *Banzhaf* v. *Smith*, 737 F.2d 1167 (D.C. Cir. 1984); *cf. Dellums* v. *Smith*, 797 F.2d 817 (9th Cir. 1986). Throughout the independent counsel's tenure, the Attorney General may remove her for good cause. Any alleged abuses occurring during a grand jury investigation or criminal trial can be reviewed and remedied by the courts. Upon conclusion of the defined investigation, the office is terminated. This is hardly the type of major, long-lasting and broad authority of the specified officers —such as life-tenured Supreme Court Justices—that requires both Presidential appointment and Senate confirmation under the Appointments Clause.

This understanding of the Appointments Clause is consistent with the Framers' concerns that Congress not contravene separation of powers principles by arrogating power to itself at the expense of the Executive Branch. *Cf. Buckley*, 424 U.S. at 129 (1976). Congress has no power under the Clause to vest itself with appointment authority. To the contrary, by classifying an officer as "inferior," Congress necessarily diminishes its own power by permitting appointment without the Senate's advice and consent. Thus, Congress' considerable discretion pursuant to the Appointments Clause to classify officers poses no threat of Congressional aggrandizement at the expense of the Executive.

The appointment of an independent counsel will not impair the President's ability to enforce the criminal laws. Not only is the independent counsel's jurisdiction limited to one case, but even in that case, the Attorney General retains substantial authority to trigger the investigation as well as the appointment and removal of counsel; and, if the President believes that no prosecution is warranted, he, of course, retains the power to pardon.[12]

To be sure, the independent counsel wields full prosecutorial power as to the single investigation she is appointed to conduct. 28 U.S.C. § 594 (1982). This is no different, however, from the broad authority accorded to specially appointed prosecutors by the Executive Branch in similar circumstances. Such prosecutors have always been treated as "inferior" officers or mere employees whose appointments did not require the Senate's advice and consent. For example, the Watergate Special Prosecutor was authorized and appointed by the Attorney General to investigate and prosecute all Watergate-related offenses under an order of the Department of Justice precluding interference from the Attorney General. *See* 38 Fed. Reg. 30,738-39 (1973). Likewise, the "parallel" independent counsels, created by Department of Justice regulation, *see* 28 C.F.R. §§ 600.1-600.5 (1987), have duties identical to those of the independent counsel created by the Ethics in Government Act and are also guaranteed independence from Executive intrusion.[13] Yet,

[12] The unanimous court that upheld the constitutionality of the independent counsel provisions in *In re Olson*, 818 F.2d 34 (D.C. Cir. 1987) (per curiam) enumerated the many ways in which the "broad power and authority of the Attorney General are closely interwoven into the statutory scheme" of the Ethics in Government Act. Apart from his discretion to determine whether to appoint an independent counsel, he has, for example, authority to shape the independent counsel's jurisditcion by referring additional matters for her investigation, and the authority to intervene in certain aspects of the independent counsel's investigation, as, for instance, when wiretaps are involved. *Id.* at 45-46.

[13] Like the statutory office of the independent counsel created by Congress in the Ethics in Government Act of 1978, the parallel independent counsels are delegated all the investigative and prosecutorial functions of the Attorney General and Department of Justice with respect to matters within their jurisdiction, including the power to convene grand juries, to apply for immunity for witnesses and to commence and conduct prosecutions. 28 C.F.R. § 600.1(a). The parallel independent counsel's office continues until his investigation is complete, 28 C.F.R. § 600.3(b), and he may not be removed by the Attorney General except for cause. 28 C.F.R. § 600.3 (a)(1).

these parallel prosecutors are also appointed by the Attorney General, without the advice and consent of the Senate.[14]

In determining that independent counsel are "inferior Officers," Congress properly looked to the limited duties to be performed. By contrast, the court below ignored the limited role and focused exclusively on the appointment and removal mechanism. Such a "boot-strapping" analysis inevitably led to an erroneous conclusion. Thus, the only grounds cited by the court below for distinguishing the status of the statutory independent counsel from the Watergate special prosecutor and the Justice Department-appointed special counsel was that the latter could be removed at the whim of the Executive. Slip op. at 18, 19 & nn.16, 17.[15] Tellingly, the court below did not assert that the duties or functions of the stautory independent counsel were distinguishable from either the Watergate special prosecutor or the Justice Department-appointed special counsel. *See* slip op. at 18 n.16.

[14] Congress' classification of the independent counsel as an "inferior Officer" is also consistent with *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). There, the court held that United States Attorneys, who wield much broader authority than independent counsel, are inferior officers who may be appointed, pursuant to Congressional authorization, by the courts on an interim basis.

[15] In any event, this argument was flatly rejected by this Court in *United States* v. *Nixon*, 418 U.S. 683 (1974), in which the Court unanimously held that the Executive did not have unfettered discretion to remove the Watergate special prosecutor. *Id.* at 694-96.

The panel majority reasoned that the independent counsel could not be an "inferior" officer because she is not subordinate to a specific "superior" officer. This conclusion is incorrect. Nothing in the Clause itself supports the court's conclusion that an inferior officer must be directly subordinate to another Executive officer. Moreover, the word "inferior," as it was commonly used at the time the Framers were drafting the Constitution, carried only a remote connotation of subordinacy.[16] It principally meant less exalted in rank, status and power. Congress was well within its discretion when it determined that an "inferior" officer need not have a "superior" to whom she is subservient.

The panel majority's interpretation also runs counter to this Court's ruling in *Ex parte Siebold*, 100 U.S. 371 (1880). In that case, this Court held that Congress, acting pursuant to the Appointments Clause, could vest the power to appoint election commissioners in the courts even though the election commissioners were not subordinate to any other officer. Yet, under the panel majority's rationale, these commissioners would not have been inferior officers, and their appointments by the court would have been impermissible.

In view of the considerations which underlay the actions of Congress, this Court should not find unconstitutional a statute which so clearly protects the public interest and which is so plainly authorized by the express terms of the Constitution. The interpretation adopted below requires reading into the Appointments Clause restrictions not found in its language. This Court should not permit such a strained revision of the constitutional language, particularly where the effect will be to give the Executive unchecked authority and produce a result con-

[16] *See* S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced from Their Originals* (1979 reprint of 1755 ed.) (defining "inferior," in order of preference, as lower in place, lower in station or rank of life, lower in value or excellency, and finally, subordinate).

trary to the overall objectives of the doctrine of separation of powers.

2. *It Is Not "Incongruous" for a Court To Appoint an Independent Counsel, an Officer of the Court, Performing Both Executive and Quasi-Judicial Functions*

The panel majority also held the appointment provision invalid on the ground that the Constitution absolutely prohibits interbranch appointments. Once again, the panel majority's conclusion failed to accord any deference to Congress' exercise of the express legislative power delegated to it by the Constitution to select, "as they think proper," the appointing authority, an exercise concurred in on three separate occasions by the President. Moreover, the ruling is contrary to decisions of this Court authorizing such "inter-branch" appointments by the Judiciary, provided there is not "*such incongruity* in the duty required as to excuse the courts from its performance." *Ex parte Siebold*, 100 U.S. at 398 (emphasis supplied) (upholding court appointment of election supervisors); *Rice* v. *Ames*, 180 U.S. 371, 378 (1901) (commissioners); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931) (commissioners who, *inter alia*, institute civil rights prosecutions).

In contrast to the panel majority's extremely unrealistic hypotheticals,[17] judicial appointments of independent counsel present no incongruity, because of the dual role that prosecutors serve as officers of the court, with responsibilities to both the Executive and the Judiciary.[18] This

[17] The panel majority hypothesizes a legislative parade of horribles, including legislation to allow courts to appoint State Department officials in charge of foreign policy. Nothing remotely like that case is now before the Court; should it ever arise, it will be time enough for the courts to apply *Siebold's* incongruity test and rule accordingly.

[18] *Newman* v. *United States*, 382 F.2d 479, 481 (D.C. Cir. 1967); *see also United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). The prosecutor is not merely an advocate, but an "administrator of justice." American Bar Association,

dual role is a time-honored concept. Indeed, the First Congress initially proposed to authorize the courts, not the Executive Branch, to appoint prosecutors. *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 108-09 (1923). While it was ultimately decided to place the appointment of prosecutors in the President, there is no indication that anyone suggested that the proposal to place such power in the courts was unconstitutional. Since several of the Framers served in the First Congress, *id.* at 57, the proposal to have courts appoint the prosecutors suggests that the Framers did not perceive any incongruity in judicial appointment of prosecutors. *Cf. Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983).

Because of the prosecutor's unique position in our system of justice, court appointments of prosecutors have been judicially and legislatively approved in a variety of contexts. In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987), for example, this Court upheld the Judiciary's inherent authority to appoint counsel to prosecute contempt proceedings when its orders are disobeyed, reasoning that the Judiciary should exercise its "inherent power of self-protection" and not depend upon the Executive Branch to redress disobedience. *Id.* at 2130-32, 2134. Likewise, in *United States* v. *Solomon*, 216 F. Supp. 835, 838-43 (S.D.N.Y. 1963), the court upheld a statute authorizing temporary court appointments to fill vacant United States Attorney positions. The court held that the statute did not violate the Appointments Clause, emphasizing that the appointments power is not intrinsically executive in nature. *Solomon*, 216 F. Supp. at 841-43. Federal courts also have statutory authority to select attorneys to perform in other capacities. For example, courts often appoint counsel to prose-

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Standards for Criminal Justice (1980), Commentary to Standard 3-1.1. He is "in a peculiar and very definite sense a servant of the law" insofar as his responsibility is not merely to win a case, but rather to ensure "that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

cute the claims of indigents. *See* 28 U.S.C. § 1915(d) (1982).[19]

The Judiciary's exercise of inherent supervisory powers over prosecutors[20] underscores the lack of incongruity in the court appointment of an independent counsel. The prosecutor is also obligated to observe the standards that courts have developed, adopted and enforced to govern prosecutorial conduct. Both the ABA Model Rules of Professional Conduct (1987), and the ABA Model Code of Professional Responsibility (1982), as amended, which the courts in various jurisdictions have adopted, stress the prosecutor's responsibility to the system of justice. The Model Code and the Model Rules forbid the prosecutor to go forward when his charges are not supported by probable cause, DR 7-103(A); Model Rule 3.8(a), and require him to cooperate with his adversary. DR 7-103(B); Model Rule 3.8(d). Additionally, the ABA Standards for Criminal Justice (1980) ("the ABA Standards") cover the full range of prosecutorial activity, including investigation, plea discussions, trial, and sentencing. These standards are routinely enforced by the courts in exercise of their supervisory powers over prosecutors to curb abuses threating the judicial system.[21]

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[19] *See McKeever* v. *Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982) (construing court's authority to request an attorney to represent an indigent under § 1915(d) as authority to appoint); *Whisenant* v. *Yuam*, 739 F.2d 160, 163-64 (4th Cir. 1984) (indigent plaintiff entitled to court-appointed counsel to prosecute civil rights claims against government officials); *see also White* v. *Walsh*, 649 F.2d 560, 563 (8th Cir. 1981) (*pro se* indigent plaintiff in civil rights action entitled to court-appointed counsel).

[20] *See United States* v. *Payner*, 447 U.S. 727 (1980); *see also United States* v. *Samango*, 607 F.2d 877, 884-85 (9th Cir. 1979); *United States* v. *Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972).

[21] *See, e.g., United States* v. *Bess*, 593 F.2d 749, 754-57 (6th Cir. 1979) (prosecutor's expression of his personal opinion of the defendant's guilt violated ABA Standards, warranting reversal of the defendant's conviction); *see also Lewis* v. *Lane*, 832 F.2d 1446, 1459 (7th Cir. 1987) (court ordered notification of state disciplinary authorities where assistant state's attorney and assistant

Finally, because the courts recognize that prosecutors perform quasi-judicial functions, the prosecutor enjoys absolute immunity from suit for his participation in the judicial process. *See Gray* v. *Bell*, 712 F.2d 490, 498 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Apton* v. *Wilson*, 506 F.2d 83, 93-94 (D.C. Cir 1974).

Thus, the prosecutor's role as an officer of the court with quasi-judicial functions demonstrates that there is nothing incongruous about the Congressional determination to empower a court to appoint an independent counsel.[22] This conclusion holds especially true because the Executive Branch has a potential conflict of interest in appointing an independent counsel. By vesting power to appoint the independent counsel in a court, Congress sought to avoid the "incongruity" arising when the Attorney General is called upon to investigate the President who appointed him or other top ranking officials with whom he has closely served. By contrast, the courts, which have experience both in appointing and supervising prosecutors and other counsel, are fully competent to

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attorney general withheld information from state courts and defense, violating Illinois analog to Model Code DR 7-103(B)); *United States* v. *Gold*, 470 F. Supp. 1336, 1351 (N.D. Ill. 1979) (dismissal of indictment ordered when grand jury witness acted as prosecutor, in violation of the ABA Standards); *United States* v. *Batchelor*, 484 F. Supp. 812, 813-14 (E.D. Pa. 1980) (prosecutor's interview of defendant without obtaining the consent of defendant's previous counsel violated the Model Code and warranted order for new trial).

[22] The nexus between the federal prosecutor and the federal judiciary is mirrored in state laws that permit the courts to appoint prosecutors in specific situations. *See, e.g., Ford* v. *State*, 4 Ark. App. 135, 628 S.W.2d 340, 341 (1982) (special prosecutor may be appointed by trial court where elected prosecutor is indicted for a criminal offense, pursuant to Ark. Stat. Ann. § 24-108 (Repl. 1962)); *Harceg* v. *Brown*, 512 F. Supp. 788, 791 (N.D. Ill. 1981) (when state's attorney is unable to attend a proceeding, "the court where said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding . . . ." (quoting Ill. Rev. Stat. ch. 14, para. 6 (1979)).

appoint an independent counsel and encounter no conflict of interest.

A court of law, specifically, the special division designated in the statute, is fully competent to appoint an independent counsel. The special division, like courts in general, has expertise in the administration of justice and has no conflict of interest. The independent counsel statute expressly provides that the judges of the special division may not sit in "any judicial proceeding concerning a matter which involves such independent counsel," except in the limited category of cases involving appointments made prior to 1987 relating to the counsel's removal by the Attorney General. 28 U.S.C. §§ 49(f), 596(a)(3) (1982). Thus, the statute avoids any "incongruity" that would be occasioned if judges were to sit on cases being handled by the prosecutor whom they had appointed.

A similar analysis disposes of the claim that an Article III court may not, consistent with separation of powers principles, determine the jurisdiction of the independent counsel pursuant to Section 592(d)(1). The authority to determine the scope of the independent counsel's jurisdiction is inherent in the Constitutional power to appoint counsel. In reviewing *ex parte* applications for wiretaps and search warrants, Article III courts are frequently called upon to make judgments concerning the nature and scope of federal criminal investigations. *See* 18 U.S.C. §§ 2516, 2518 (1982 & Supp. 1986) (requiring judicial approval of federal wiretaps); *United States* v. *Giordano*, 416 U.S. 505, 515 (1974) (citing with approval provision requiring judicial approval of wiretaps); *see also* Fed. R. Crim. P. 41 (judicial authority to issue search warrants); *United States* v. *Torres*, 751 F.2d 875 (7th Cir. 1984) (discussing judicial authority pursuant to Fed. R. Crim. P. 41). Just as the Executive is not in a position to appoint and supervise independent counsel, the Executive should not define the independent counsel's juriisdiction. As the Watergate experience clearly demonstrates, a thorough and fair investigation of high-level

wrongdoing can be frustrated by limiting the scope of a criminal investigation. *See supra* note 2. Given the practical, demonstrated problems from past experience, it would be "incongruous" to provide for the judicial appointment of a special prosecutor, but then to leave to the Attorney General or the President the task of demarcating the scope of her operations.

B. The Procedures for Removing the Independent Counsel Are Constitutional but Are Not Before the Court

The panel majority reached out to issues not before it to hold that the provisions for the removal of the independent counsel are unconstitutional. The removal provisions, requiring the Attorney General to have "good cause" and permitting judicial review, are not at issue in this case. No attempt has been made to remove appellant; thus, it is premature to consider these provisions.[23]

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[23] In *Bowsher* the Court considered the constitutionality of the removal provision even though it had not been invoked because the Comptroller General's "presumed desire to avoid removal by pleasing Congress" created a "here-and-now subservience to another branch that raises separation of powers problems." 106 S. Ct. at 3189 n.5 (quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)). Here, of course, the independent counsel cannot be removed by Congress nor by anyone but the Attorney General, and only by him for good cause or specified disabilities. Thus, the independent counsel removal provisions raise no issues of "here-and-now" subservience to a branch other than the Executive and are not ripe for review.

Moreover, when Congress reauthorized the independent counsel provisions in 1987, it amended the removal provisions to eliminate the principal deficiency that the panel majority perceived: namely, the judicial review standard that the court was to apply when reviewing the Attorney General's removal of an independent prosecutor. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1304 (1987). The court below asserted that this standard of review practically vested the removal power in the courts. While the panel majority was incorrect in its analysis of the prior review standard, the new legislation adopts an even more restrictive standard of review. Since the question was never properly before the court and has been obviated by the passage of new legislation, this Court need not, and should not, address it.

In the event this Court elects to address the removal provisions, it should hold them constitutional. The limitations on the Attorney General's removal authority are modest; they simply require that the Attorney General have "good cause" for removing the independent counsel and that the reviewing court, if its jurisdiction is invoked, be satisfied that the Attorney General has not made an error of law or fact. These provisions, unlike those invalidated in *Bowsher* and *Myers* v. *United States*, 272 U.S. 52 (1926), do not involve an attempt by Congress to aggrandize its powers to play a role in the removal of officers charged with performing nonlegislative functions.[24] The statute does not give Congress any role in the removal of an independent counsel.

It is this prospect of Congressional aggrandizement at the expense of the Executive that was the Framers' primary concern about the separation of powers[25] and that explains this Court's recent separation of powers decisions. The absence of that critical factor distinguishes those cases from this one. In *INS* v. *Chadha*, 462 U.S. 919, 959 (1983), and *Bowsher*, 106 S. Ct. at 3192, the Court invalidated statutes that reserved to Congress a role in executing the laws. By contrast, where Congress, without aggrandizing itself, has sought merely to protect individual appointees from Executive Branch influences that would deter the performance of their duties, this Court has upheld the statutes involved.

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[24] In *Myers*, Congress' invalid role was to veto removal of officers performing nonlegislative functions. 272 U.S. at 161. In *Bowsher*, Congress reserved to itself the power to remove the Comptroller General but impermissibly gave him executive, *i.e.*, nonlegislative, functions. 106 S. Ct. at 3188-89.

[25] *See Buckley*, 424 U.S. at 129 (1976) (emphasizing Framers' "fear that the Legislative Branch . . . will aggrandize itself at the expense of the other two branches").

In *Humphrey's Executor*, for example, the Court upheld provisions that restricted the President's authority to remove Federal Trade Commissioners. 295 U.S. at 628-29. The *Humphrey's Executor* Court distinguished *Myers*, 272 U.S. at 52, in which the Court had held unconstitutional a statute that prohibited the President from removing certain postmasters without the advice and consent of the Senate. 272 U.S. at 107, 176. The *Bowsher* Court reconciled the two cases by identifying the precise issue upon which the holding in *Myers* had turned: "congressional participation in the removal of executive officers is unconstitutional." 106 S. Ct. at 3188. *Bowsher* turned on the same crucial factor: "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the law except by impeachment." *Id.* Here, Congress has no power to remove the independent counsel.

The removal provisions here are consistent with those approved by this Court in other cases. Such limitations are valid when the Congress has properly vested appointment of an "inferior officer" in a department head or in the courts of law. *Myers*, 272 U.S. at 164. As a matter of constitutional structure and logic, it follows that, if Congress may authorize appointments by courts of law, then Congress may also place limitations on Presidential removal of inferior officers so appointed.

In *United States* v. *Perkins*, 116 U.S. 483 (1886), for example, the Court upheld the power of Congress to place limitations on the ability of the Secretary of the Navy to dismiss cadets he had appointed pursuant to Congressional authorization on the ground that such cadets were "inferior Officers" whose appointment and removal could be established by Congress. The Court stated: "[t]he constitutional authority in Congress to thus vest the appointment [of such inferior officers] implies authority to limit, restrict, and regulate the[ir] removal by such laws as Congress may enact in relation to the officers so appointed." *Id.* at 485. Thus, because Congress has validly vested the appointment of the independent counsel in the

courts of law, it may validly limit the removal of such counsel, including a requirement of "good cause" and judicial review.

Congress has clearly made the decision that, within the statutorily imposed system of check and balances, the independent counsel needs to operate without hindrance from the President. *Wiener*, 357 U.S. at 629. That judgment clearly is justified. The very purpose of the statute would be frustrated if the President could dismiss the independent counsel whenever the investigation threatened to lead to indictment or embarrassment of high-level Executive officials. It thus follows inescapably under this Court's precedents that the removal limitation is valid.

C. The Procedures Under Which the Independence Counsel Operates Are Constitutional

Finally, the majority below asserted as a basis for its holding the absence of ongoing Presidential supervision over the exercise of the independent counsel's discretion. No provision of the Constitution requires such supervision, nor is it mandated by general separation of powers principles.[26] Once it is established that the Congress may provide for appointment by a court of an independent counsel and may limit her removal by the President, then it follows that Congress may insulate the independent counsel from day-to-day supervision by the very individuals she is charged with investigating. To hold that the person investigated or his allies may control the operations of the investigator would defy experience and common sense.

The panel majority suggests that Presidential supervision is necessary to protect targets against abusive investigations by an overly zealous prosecutor. This is simply not the case. The subjects of an investigation or prosecution are well protected from the possibility of

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[26] *See, e.g., Kendall* v. *United States*, 12 Pet. 524, 610 (1838) (limiting Presidential supervision and control over postal employee).

abusive practices by an independent counsel. Although denominated "independent," the special counsel operates within a statutory framework of checks and balances that limit her discretion and ensure her accountability. For example, the Attorney General must make the initial finding of "sufficient" grounds to investigate criminality before an independent counsel may be appointed. The Attorney General may remove the counsel for "good cause." Further, the specific provisions of the Constitution protecting individuals, as well as the laws of the United States, also cabin the discretion of the prosecutor. The independent counsel is required to "comply with written or other established policies of the Department of Justice with respect to the enforcement of the criminal laws" except "where not possible." 28 U.S.C. § 594(f). Finally, as discussed above, all prosecutors, including the independent counsel, have a special quasi-judicial status as representatives of government and as officers of the court.[27] Thus, any prosecutor, including an independent counsel, is subject to the supervisory power of the courts.

The panel majority speculates that individuals' rights may nonetheless be injured by actions of the independent counsel. No such abuses have been alleged here. In fact, by putting eminent, experienced lawyers in charge of these investigations, the distinguished division of the Court of Appeals, appointed by the Chief Justice, has improved the likelihood of disinterestedness and fairness. Far from eroding the protection of individuals' rights, the independent counsel provisions protect the administration of justice from actual or perceived bias that "undermines judicial fairness" and "weakens public confidence in that fairness." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 42 (1950) (quoting *Administrative Manage-*

[27] *See Provision for Special Prosecutor: Hearings on H.R. 14476 et al. Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 65-69 (1976) (Memorandum of Professor Herbert S. Miller, consultant to ABA Special Committee).

ment in the Government of the United States, Report of the President's Committee on Administrative Management, 36-37 (1937)), *modified on other grounds*, 339 U.S. 908 (1950). As this Court recently reiterated, " '[J]ustise must satisfy the appearance of justice,' . . . and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite." *Young*, 107 S. Ct. at 2140 (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)). It hardly comports with the required "appearance of justice" to place daily supervision of the prosecutor in those whom he is charged to investigate or those who are close political allies of the investigation's target.

Any specific claims that the independent counsel has acted improperly are appropriately directed to the courts that regularly review properly presented claims of prosecutorial misconduct. The panel majority's speculation that litigants may be chilled from raising such claims for fear of reprisal for impugning a court appointee is unfounded. The special division is barred from participating in any such proceeding. 28 U.S.C. § 49(f). Thus, any allegation of prosecutorial misconduct would be heard not by the appointing court, but by a district court supervising the proceeding with review in the appropriate Court of Appeals. If court appointments of counsel of all types were halted on the basis of a mere possibility that challenges to court appointees' actions would be chilled, our system of criminal justice could hardly exist.

Much of the panel majority's reasoning amounts to an argument that the independent counsel provisions are bad policy. For example, the panel majority speculated that the independent counsel might develop powerful institutional incentives to pursue investigations and bring indictments to preserve their own functions. These policy concerns have not been borne out by experience with independent counsel appointments. Since 1978, the Department of Justice has reported at least thirty-six instances triggering the independent counsel provisions. Twenty-five of these matters were closed without a preliminary investigation and in eight of the remaining eleven in-

dependent counsel were appointed. S. Rep. No. 123, 100th Cong., 1st Sess. 6-7 (1987). Of the eight independent counsel, the first four terminated their offices after making determinations that no prosecution was warranted. Wash. Post, Jan. 24, 1988, at A8, col. 1. More recently, independent counsel have obtained indictments and convictions against two covered officials. Wash. Post, Feb. 23, 1988, at A22, col. 1. This record hardly suggests the work of a self-interested bureaucracy intent upon perpetuating itself.

In any event, such policy judgments are not for the Judiciary to make. That is the province of the Congress, and the Congress has definitively endorsed the independent counsel mechanism by enacting the law in 1978 and reenacting it in 1983 and 1987,[28] each time by overwhelming margins. The Congress' endorsement bespeaks public confidence in and support for both the concept and the operation of an independent mechanism to investigate and prosecute wrongdoing at high levels in the Executive Branch. Further, two Presidents have eschewed the veto, three times signed the legislation and repeatedly invoked it without public controversy over the last decade. The panel majority's policy arguments are inappropriate and unfounded.

In sum, the availability of the judicial process and the statutory limitations on the operations of the independent counsel are more than adequate to handle the remote possibility of abuse by independent counsel and to protect the rights of the targets of independent counsel investigations. The statute is also likely to prevent a proven abuse that the panel majority seems to ignore but was of principal concern to the Congress—the undue benefits and leniency these individuals might receive if investigated by their political friends and allies.

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[28] Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987).

CONCLUSION

Far from undermining the checks and balances of the constitutional system, the independent counsel provisions under review serve as a needed counterweight to the unfettered ability of the President and the Attorney General to investigate and resolve serious criminal allegations against their closest political appointees. The provisions do so in a limited manner which does not enhance Congressional power, but that does enhance public confidence in the administration of justice.

The authority of Congress to enact the independent counsel statute is firmly anchored in the explicit language of the Constitution. Substantial deference is owed to Congress' judgment about how best to solve clearly established problems of government, particularly when it is not seeking to aggrandize its own power. Accordingly, appellees' challenges fail to satisfy the heavy burden of demonstrating that this statute is beyond the constitutional authority vested in Congress.

For the reasons stated above, the American Bar Association as *amicus curiae* respectfully requests this Court to reverse the Court of Appeals' ruling and hold that the independent counsel provisions of the Ethics in Government Act of 1978 are constitutional.

Respectfully submitted,

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